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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/005,677	12/05/2001	Suzanne Mary Spindler	F3274(C)	9568
201	7590	03/23/2004	EXAMINER	
UNILEVER PATENT DEPARTMENT 45 RIVER ROAD EDGEWATER, NJ 07020			BHAT, NINA NMN	
			ART UNIT	PAPER NUMBER
			1761	
DATE MAILED: 03/23/2004				

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/005,677	<b>Applicant(s)</b> SPINDLER ET AL.	
	<b>Examiner</b> N. Bhat	<b>Art Unit</b> 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
  - If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
  - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
  - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 12 February 2004.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-7 is/are pending in the application.
- 4a) Of the above claim(s) 3-7 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1 and 2 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☒ Claim(s) 1-7 are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### DETAILED ACTION

1. Applicant's election of Group I, claims 1-2 in the paper dated 2-14-2004 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)). Claims 3-7 have been withdrawn from further consideration. The restriction requirement is hereby made FINAL.

2. Action on the merits of claims 1-2 follows:

3. Claims 1-2 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kahn et al.[USP 4,552,773]. Kahn et al. teaches a whipped composition having an overrun between 90-150% wherein at least 50% of the fat is solid beta phase crystalline fat at 0°F, which would obviously imply that rest of the fat would be in the liquid phase at 0°F. The composition is an ice cream composition. However, Kahn et al. does not teach that the composition has a fat phase, which is liquid at -5°C. Kahn et al. teaches providing a whipped ice cream or milkshake composition which is shelf stable for 6 months at 0°F wherein at least 50% of the fat phase is solid, which implicitly implies that the rest of the fat is in its liquid phase. The amount of fat used in the ice cream preparation is within the range as described by applicant, and further the type of fat being used in the composition include lauric fats, coconut oil, palm kernel oil, babassu oil, palm oil, butter fat and the like. [Note Column 3, lines 5-11]

It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide a composition comprising a fat phase

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and having overrun of at least 90% wherein at least 45% w/w of the fat is liquid at -5°C from reading Kahn et al. because Kahn et al. does teach providing fats in an ice cream composition in the same proportions and amounts and the same types of fats used by applicant in preparing an ice cream which is stable at 0°F and wherein at least 50% of the fat is solid at this temperature and remains in this condition for 6 months. Thus at least 50 wt% of the fat would be in the liquid phase at 0°F and to because the fats used by Kahn et al. are similar to the fats used by applicant it would reasonably follow to the ordinary artisan familiar with frozen confectionery preparation, that the ice cream would have at least 50wt% of fat in the liquid phase at -5°C which is 23°F, to optimize the proportion of fat to be at least 45% where there has been a teaching of at least 50% of the fat is liquid as taught by Kahn et al. renders the invention as a whole obvious to one having ordinary skill in the art at the time the invention was made and provides a suggestion to one of ordinary skill that optimization of the amount of fat to be in the liquid phase at -5°C would have been within the realm of the ordinary artisan.

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

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Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1-2 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-2 of copending Application No. 10/005,678. Although the conflicting claims are not identical, they are not patentably distinct from each other because both applications claim an ice cream or composition comprising a fat phase and having an overrun of at least 90% and wherein at least 45% w/w of the fat is in the liquid phase at -5°C, in the instant case. In the '078 case applicant claims a composition comprising a fat phase and having overrun of at least 90% characterized in that at least 50% w/w of the fat phase is liquid at -5°C. The amount of fat of at least 45%w/w in the instant case would read on at least 50 wt% of the fat in the co-pending case, i.e., the range overlaps and thus to optimize the proportion of fat phase being liquid in the ice cream composition would have been obvious to one having ordinary skill in the art.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patent.

6. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Kahn et al.'243 teaches a freezer stable whipped ice cream and milk shake food product which has at least 50% of a solid crystalline fat phase at 0°F. Desia et al. teaches a stable aerated frozen confection having a high solid fat content at room temperature. Fayard et al. teach a frozen confectionery product having a low fat content and mean ice crystal diameter of

20-60 microns. EP 1 212948 teaches aerated composition process and apparatus using a freezer barrel with an aerating means, which has lo displacement volume. Adolphi et al. teaches an aerated frozen product.

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to N. Bhat whose telephone number is 571-272-1397. The examiner can normally be reached on Monday-Friday, 9:30AM-6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



N. Bhat  
Primary Examiner  
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